In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-260

CARMINE TRAMUNTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a defendant in a perjury trial, contends that his privilege against self-incrimination was violated when the government attorney, on cross-examination, asked him to explain answers petitioner gave under use immunity before a 1966 grand jury investigating unrelated matters; that such use of his grand jury testimony also violated the statute under which he was granted immunity; and that such use of his grand jury testimony resulted in "punishment without trial" for the 1966 perjury.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of six counts of perjury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-29a; 500 F. 2d 1334).

The indictment charged that petitioner lied when he testified on his own behalf in a 1971 trial for conspiracy, mail fraud, and stock fraud. Petitioner was acquitted in the 1971 case; he perjured himself when he denied knowing or meeting with five of his alleged co-conspirators and when he denied attending a particular meeting. Petitioner does not contend that the evidence is insufficient to sustain the conviction.

Petitioner testified in his own defense in the trial below. On direct examination by his counsel he denied that his testimony in the 1971 trial was false. When the government elicited background information on cross-examination, petitioner testified that in 1963 and 1964 he worked for a trucking firm and that John Dioguardi, petitioner's friend for 20 to 30 years, was associated with Jard Products (Pet. App. 66a-68a, 76a-77a, 81a). The government attorney then introduced petitioner's testimony, before a 1966 grand jury, that he did not remember where he worked in 1963 or 1964, that he did not remember any other jobs at which he had worked over the years, and that he did not know where John Dioguardi worked (Pet. App. 66a, 74a, 79a).[1] At the time these statements were introduced neither the government attorney nor petitioner's attorney was aware that petitioner had testified before the 1966 grand jury under a grant of immunity (Pet. App. 30a).[2]

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[1]The occupations of petitioner or John Dioguardi were not at issue, nor were the 1966 statements introduced for any bearing the content of those statements might have on any of the factual questions in dispute in the case. The grand jury answers were introduced only to impeach petitioner's credibility as a witness and to demonstrate a continuing pattern of perjury.

[2]Although petitioner had been granted both transactional and "use" immunity under 18 U.S.C. (1964 ed.) 1406, only the "use" aspect of the immunity is at issue here (Pet. App. 12a, n. 4). Section 1406 was repealed in 1970. 84 Stat. 929.

Upon discovery of the immunity grant, petitioner moved for a new trial. After hearing argument on the issue (Pet. App. 87a-104a) the district court denied the motion (Pet. App. 30a-46a), finding that "the facts of this case offer particularly compelling evidence of the falsity of the previous grand jury testimony" (Pet. App. 38a).

1. Petitioner contends that the use of his 1966 grand jury testimony for cross-examination violated his privilege against self-incrimination. This contention was rejected by the court of appeals (Pet. App. 12a-17a) in an opinion upon which we rely. The Fifth Amendment does not prohibit the use of false or evasive testimony given under grant of immunity where the testimony is used in a trial for crimes committed after the grant of immunity. As the court of appeals stated (Pet. App. 13a):

> The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions.

Glickstein v. *United States*, 222 U.S. 139, 143, and *United States* v. *Bryan*, 339 U.S. 323, 338-341, directly support this reasoning. Cf. *United States* v. *Kahan*, 415 U.S. 239, in which false claims of indigency made

by the defendant in requesting court-appointed counsel were used by the government in its case in chief as supporting the inference that the defendant had received the illegal gratuities charged. The false claims in *Kahan* were no more compelled than was the falsity in the statements before the grand jury in the instant case. And as in *Kahan*, the incriminating component of petitioner's statements lies not in its content, but in petitioner's knowledge of the falsity.[3]

2. Petitioner also contends that the use of the 1966 grand jury testimony was not permitted by the statute under which he was granted immunity, 18 U.S.C. (1964 ed.) 1406. However, as the court of appeals held (Pet. App. 17a-20a), the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration. "The failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use" (Pet. App. 19a); a contrary holding would frustrate achievement of the statute's purpose. The court's interpretation of the statute is also consonant with the legislative history of the present immunity statute, 18 U.S.C. 6001, *et seq.* H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 42, states:

> The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. * * * It is included out of caution to insure that such immunity is not given. [Citations omitted.]

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[3]Petitioner's reliance (Pet. 17-18) on a dictum in *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 350-351, n. 10, is misplaced. The immunity in *Shotwell* was transactional, and the point of the footnote is only that if a taxpayer is given immunity as to a particular tax transaction, the fact that some of his statements about that transaction are false would not permit the government to prosecute him for *that transaction*.

And again, the statute speaks of "compelled" testimony. Because petitioner was not compelled to testify falsely, his answers fell outside whatever prohibition on use the statute contains.[4] Cf. *Glickstein, supra,* 222 U.S. at 143-144.

3. Petitioner's contention (Pet. 13-16) that the use of the 1966 grand jury testimony amounts to "punishing" him for the 1966 perjury is misdirected. Petitioner was convicted and sentenced for committing perjury while testifying at his 1971 trial for stock and mail fraud, not for the perjury he committed before the grand jury in 1966. Use of the 1966 testimony is objectionable, if at all, only as "other crime" evidence. And that objection would fail because petitioner's 1966 deeds impeach his credibility and establish that his 1971 lies were intentional rather than accidental.[5] See also *United States* v. *Freedman*, 445 F. 2d 1220, 1224 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[4]*United States* v. *Alter*, 482 F. 2d 1016 (C.A. 9), and *Application of Senate Select Committee*, 361 F. Supp. 1282 (D.D.C.), cited by petitioner (Pet. 11-13), are inapposite. In both cases the courts interpreted the statute to prohibit the use of compelled testimony in a prosecution for false statements made prior to the immunized testimony. This use of immunized testimony to prove a previous lie effectively penalized a witness for telling the truth under immunity; quite the contrary is true here.

[5]The trial judge was competent to determine the truth or falsity of the 1966 grand jury testimony for purposes of its admissibility in the instant case. See *United States* v. *Kahan, supra,* 415 U.S. at 241-243, nn. 2, 3.